UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

STEVENS CREEK CHRYSLER JEEP
DODGE, INC.

and

Cases 20-CA-33367
20-CA-33562
20-CA-33603
20-CA-33655

MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS OF AMERICA, AFL-CIO

GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The General Counsel hereby excepts to the following portions of the Administrative Law Judge's decision (hereinafter ALJ and ALJD) dated July 1, 2008.

1. The ALJ's failure to find that there were 13 employees in the bargaining unit as of March 2, 2007, the date the threats and interrogations as found by the ALJ commenced. ALJD 3, ll. 1-2; Tr. 18-19.[1]

2. The ALJ's failure to find that authorization cards were signed by 9 out of the 13 employees in the bargaining unit as of March 2, 2007, thereby constituting a majority. ALJD 3, ll. 1-2; Tr. 18-19.

3. The ALJ's failure to find that Mike Frontella, Service Manager, coercively interrogated Jeff Wells prior to the commencement of his employment. ALJD 6, l. 22-28; 7, ll. 23-35; GC Exh 18.

4. The ALJ's failure to find that Matthew Zaheri, Respondent's owner and president, threatened the mechanics with plant closure if they brought the Union in. ALJD 6, ll. 38-50; Tr. 223, 272-73, 1283-86.

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[1] Reference to the ALJD are noted as "ALJD" followed by page number and line number. References to the transcript are noted as "Tr.____," and references to General Counsel Exhibits are noted as "GC Exh ____."

5. The ALJ's failure to find that Jim Garcia, Service Director, gave the impression of surveillance during meetings with employees where he revealed specific knowledge of their union activities. ALJD 7, ll. 37-39; Tr. 630-31, 666, 690-91, 696, GC Exh 20.

6. The ALJ's failure to find that General Manager Chris Nickerson coercively interrogated employees. ALJD 4, ll. 8-9; 7, ll. 18-35.

7. The ALJ's failure to find that Zaheri coercively interrogated employees in group meetings after the commencement of the Union's organizing drive. ALJD 7, ll. 18-35; Tr. 1289, 1293-95.

8. The ALJ's failure to find that Garcia threatened employees with loss of wages in the event the Union became the employees' representative. ALJD 6, ll. 37-50; Tr. 630, GC Exh 20.

9. The ALJ's finding that Zaheri did not unlawfully solicit grievances from employees during group meetings held after the commencement of the Union's organizing drive. ALJD 7, ll. 50-52; Tr. 386, 700.

10. The ALJ's failure to find that Garcia made implied threats of unspecified reprisal to employee Avelar that other employees were quitting their support of the Union and that remaining employees should do so too. ALJD 6, ll. 37-50; Tr. 387-89.

11. The ALJ's failure to find that Zaheri threatened employees with implied termination when he stated to them that "I own you" and that they were replaceable during group meetings held after the commencement of the Union's organizing drive. ALJD 6, ll. 37-50; Tr. 152-53, 383, 443, 597, 632-33, 701.

12. The ALJ's failure to find that Zaheri invited employees to come to his office or to call him to discuss anything immediately after telling them "don't let outsiders influence you." ALJD 7, ll. 50-52; Tr. 386, 700.

13. The ALJ's finding that Zaheri had an open door policy. ALJD 7, l. 51.

14. The ALJ's failure to find that Zaheri stated to employees on May 11 that "outsiders aren't going to fix your problems." ALJD 1-12; Tr. 1230-31.

15. The ALJ's failure to find that Garcia told employees that the Union could not help them because it could not help the employees at the Porsche dealership across the street. ALJD 1-12; GC Exh 18.

16. The ALJ's failure to find that Nickerson coercively interrogated Patrick Rocha by asking him if he were still a union member. ALJD 7, ll. 17-35; Tr. 315.

17. The ALJ's failure to find that Zaheri and Garcia made statements of futility to employees. Tr. 1230-31.

18. The ALJ's failure to find that Garcia threatened employees that Respondent would not build a new facility if the shop went Union. Tr. 6, ll. 37-50; GC Exh 20.

19. The ALJ's failure to find that mechanic Emmanuel Gonzales was given a pay raise of $1.50 per hour to dissuade him from supporting the Union. ALJD 5, ll. 1-4; Tr. 1025-26.

20. The ALJ's failure to find that Respondent discharged Patrick Rocha because of his union support and activities and to dissuade other employees from supporting the Union. ALJD 9, ll. 44-45; Tr. *passim.*

21. The ALJ's failure to find that Respondent treated Rocha disparately as it has not disciplined other employees for coming in late, leaving early, or missing workdays altogether. ALJD 9, ll. 17-42; Tr. *passim.*

22. The ALJ's failure to find that Respondent did not require employees to be on the premises forty hours a week. ALJD 9, ll. 17-42; Tr. 124, 134, 292, 378, 634, 865.

23. The ALJ's failure to find that the reason why Rocha was not at work forty hours a week was because Respondent did not assign him a sufficient amount of work to keep him occupied forty hours a week. ALJD 9, ll. 17-42; Tr. 333-36.

24. The ALJ's failure to find that Respondent paid employees on a piecerate system, whereby employees were not paid for time spent on premises but for work produced regardless of the amount of hours it took them to produce it. ALJD 9, ll. 17-42; Tr. *passim.*

25. The ALJ's failure to find that Respondent presented shifting reasons for its decision to discharge Rocha. ALJD 9, ll. 17-42; Tr. *passim.*

26. The ALJ's failure to find that Respondent had condoned whatever problems it was having, if any, with Rocha's attendance until it learned of the Union's organizing drive and suspected Rocha of being a ringleader. ALJD 9, ll. 17-42; Tr. *passim.*

27. The ALJ's failure to find that Zaheri gave a statement to the Board during its investigation that the decision to discharge Rocha was made on Monday, March 5, 2007, the next working day after Respondent learned of the Union's organizing drive. ALJD 9, ll. 17-42; GC Exh 34.

28. The ALJ's failure to credit the pretrial affidavits of Wells and Bumagat to the extent that they corroborate other facts found by the ALJ. ALJD 4, ll. 1-6, 17-20.

29. The ALJ's finding that Respondent made the decision to discharge Rocha before March 2, 2007. ALJD 9, ll. 17-42; Tr. *passim.*

30. The ALJ's failure to find that Respondent's claim that it made the decision to discharge Rocha before March 2, 2007, is not supported by any documentary evidence. ALJD 9, ll. 17-42; Tr. *passim.*

31. The ALJ's failure to find that, whereas it made out Rocha's final paycheck at 8:06 a.m. on Monday, March 5, 2007, in anticipation of discharging him that day, its failure to make out the final paycheck the morning of Friday, March 2, 2007, was inconsistent with its testimony that it was going to discharge Rocha on March 2, 2007, but could not do so due to the unexpected arrival of a Chrysler factory representative. ALJD 9, ll. 17-42; Tr. 1061.

32. The ALJ's failure to find that Garcia's statement made to Michael Lane on Friday, March 2, 2007, immediately after it learned of the Union's organizing, that if he found out that Rocha and Avelar had organized the union luncheon meeting held that day, he would "blow them out" (which the ALJ found to have been made) is inconsistent with Respondent's testimony that it had decided to terminate Rocha on February 27, 2007, and was just awaiting the end of the workweek to carry it out. ALJD 9, ll. 17-42.

33. The ALJ's failure to explain why he credited Garcia's testimony that Respondent had already decided to discharge Rocha when it learned about the Union's organizing drive, testimony unsupported by any documentary evidence, when he discredited Garcia on almost every other aspect of his testimony. ALJD 9, ll. 17-42; Tr. *passim.*

34. The ALJ's failure to find that Garcia's testimony that Rocha was discharged because of his attendance problems culminating with a late arrival on February 27, 2007, was inconsistent with the statement on the Separation Notice given Rocha on March 6, 2007, that he was terminated because of "Patrick's inability to get the work done correctly and on time" and "left early without permission did not advise anybody that he left." ALJD 9, ll. 17-42; GC Exh 15,

35. The ALJ's failure to find that Garcia's testimony that Rocha was discharged because he came in late on February 27, 2007, is not listed on the Separation Notice given to Rocha, which instead refers to Rocha's clocking out early on March 2, 2007. ALJD 9, ll. 17-42; GC Exh 15.

36. The ALJ's apparent finding that Garcia counseled Rocha on February 12, 19, and 26, 2007 about attendance problems. ALJD 9, ll. 17-42; GC Exh 15.

37. The ALJ's failure to draw an adverse inference from Respondent's failure to call as a witness a computer expert who could have examined the hard drive on Garcia's computer and establish exactly when the alleged February 12, 2007, minute was created. ALJD 5, ll. 25-26.

38. The ALJ's finding that Nickerson credibly testified that Rocha cost the dealership time and money by clocking out early. ALJD 9, ll. 41-42; Tr. *passim.*

39. The ALJ's finding that Rocha was discharged for attendance and productivity issues. ALJD 9, ll. 44-45; Tr. *passim.*

40. The ALJ's failure to find that Rocha's productivity was better than most other mechanics employed by Respondent. ALJD 9, ll. 44-45; Tr. 1067-74; GC Exh 26.

41.. The ALJ's failure to find that Respondent's asserted reason for discharging Rocha is not supported by any documentary evidence. ALJD 9, ll. 17-42; Tr. *passim.*

42. The ALJ's failure to find that Respondent's statement to the Employment Development Department regarding Rocha's discharge is inconsistent with the reasons it asserted herein. ALJD 9, ll. 17-42, GC Exh 31.

43. The ALJ's failure to find that Garcia and Zaheri were not telling the truth when they claimed Rocha was not at work on Monday, March 5, 2007, inasmuch as its own production records establish he worked that day. ALJD 9, ll. 17-42; GC Exh 23, 24.

44. The ALJ's failure to find that Respondent prepared Rocha's final paycheck the morning of the next working day after it learned of Rocha's union activities. ALJD 9, 11. 17-42; Tr. 974.

45. The ALJ's failure to find that Respondent allows its mechanics to leave early provided they first notify a manager. ALJD 9, ll. 17-42; Tr. *passim.*

46. The ALJ's failure to find that Rocha would notify Service Manager Mike Frontella when he left early during his employment at Respondent. ALJD 9, ll. 17-42; Tr. 318.

47. The ALJ's failure to find that Rocha complained to Garcia in mid-February, 2007, about not being assigned enough work. ALJD 9, ll. 17-42; Tr. 333-36.

48. The ALJ's failure to find that Garcia's and Zaheri's testimony about the reason for Rocha's discharge was inconsistent, whereas both claimed they brought the issue to the attention of the other. ALJD 9, ll. 17-42; Tr. 969, 1188.

49. The ALJ's failure to find that Respondent incurred no costs due to the early departure of a mechanic who had no work assigned to him. ALJD 9, ll. 17-42; Tr. *passim.*

50. The ALJ's failure to find that Respondent's production records establish that its workload was relatively light during the month of February, 2007. ALJD 9, ll. 17-42; Tr. 1018; GC Exh 25.

51. The ALJ's implied credibility determination that Garcia testified truthfully that he counseled Rocha on February 12, 19, and 26, 2007, about his attendance problems and his failure to explain said credibility determination. ALJD at 9, ll. 23-24; Tr. *passim.*

52. The ALJ's implied credibility determination that Garcia testified truthfully that he contacted Zaheri and recommended discharge on February 27, 2007, and his failure to explain said credibility determination. ALJD at 9, l. 24.25; Tr. *passim.*

53. The ALJ's implied credibility determination that Zaheri testified truthfully that he approved the discharge of Rocha on February 27, 2007, and his failure to explain said credibility determination. ALJD at 9, l. 25; Tr. *passim.*

54. The ALJ's implied credibility determination that Garcia testified truthfully that he intended to discharge Rocha on March 2 but was delayed due to the unexpected arrival of a Chrysler factory representative, and his failure to explain said credibility determination. ALJD at 9, ll. 25-27; Tr. *passim.*

55. The ALJ's failure to draw an adverse inference from Respondent's failure to call, as a witness, the unnamed Chrysler factory representastive who allegedly visited Respondent's facility on March 2, 2007. ALJD at 9, ll. 25-27.

56. The ALJ's failure to conclude that the serious and pervasive unfair labor practices found herein warranted a *Gissel* bargaining order. ALJD 11, ll. 45-48; Tr. *passim.*

57. The ALJ's failure to find and conclude that Respondent unilaterally eliminated the job of Steve Rother, Lube Technician, in violation of Section 8(a)(5). ALJD 11, ll. 50-52; Tr. 75, 962-63.

58. The ALJ's failure to find and conclude that Respondent unlawfully failed to furnish the Union with requested information relevant to collective bargaining in violation of Section 8(a)(5). ALJD 11, ll. 50-52; GC Exh 21, 22.

59. The ALJ's failure to find that Respondent refused to hire Mark Higgins because of his union affiliation. ALJD 10, ll. 38-44; Tr. *passim.*

60. The ALJ's implied credibility determination that Zaheri testified truthfully that he chose not to hire Higgins based on recommendations he had received from Frontella, Robles, and Hanicke, and his failure to explain said credibility determination. ALJD at 10, l. 38-39; Tr. *passim.*

61. The ALJ's implied credibility determination that Zaheri testified truthfully that he told Garcia that he did not believe Higgins could change, and his failure to explain said credibility determination. ALJD at 10, ll. 41-42; Tr. *passim.*

Dated at San Francisco, California, this 12th day of August, 2008.

/s/ David B. Reeves

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GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

On March 2, 1987, Jim Garcia, Service Director for Stevens Creek Chrysler Jeep Dodge, Inc., Respondent herein, a automobile dealership located in San Jose, California, learned that most of his automobile technicians[1] had just met for lunch at Harry's Hofbrau with a representative of Machinist District Lodge 190, the Union herein, and had signed authorization cards. This was Respondent's first knowledge of the Union's organizing drive. ALJD at 7, ll. 26-27.[2] Garcia responded by immediately calling[3] Chris Nickerson, Respondent's General Manager, and embarking, as found by the Administrative Law Judge (hereinafter "ALJ" or "Judge"), upon a campaign of unlawful threats, coercive interrogations, and wage increases intended to dissuade the mechanics from supporting the Union. One of the first things Garcia did was to call Mike Lane, a technician, into his office and question him about the luncheon, including who was there and what happened. During this meeting, Nickerson telephoned back, and Garcia repeated what he had just told Lane – that if he found out that mechanics Avelar and Rocha were behind the Union, he would "blow them away." This meeting occurred in mid-afternoon on Friday, March 2, 2007 (all dates hereinafter are 2007 unless otherwise indicated). At 8:06 a.m. on Monday, March 5, the next working day, Garcia, true to his word, had Patrick Rocha's final paycheck cut in preparation to "blow him away," which he accomplished the following morning.

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1 The word "technician" will be used interchangeably with "mechanic" herein.

2 References to the transcript will state: (Tr.___); General Counsel's exhibits will be identified as (GC Exh ____).

3 This is established, despite the denials under oath by Garcia and Nickerson, by Nickerson's cell phone records which were admitted into evidence after their testimony to impeach. GC Exh. 38; Tr. 1106.

Despite this highly suggestive timing, despite evidence of disparate treatment, and despite having discredited Garcia on nearly everything else, the ALJ, explicably and **without explanation,**[4] credited Garcia's testimony that the decision to discharge Rocha had been made on February 27 before Respondent had learned of the Union's organizing drive. The ALJ so found despite the absence of even one shred of documentary evidence supporting Respondent's contention that the decision to terminate was made before March 2. The documents that do exist, such as the Separation Notice handed to Rocha on March 6 and the letter to the Employment Development Department state reasons for the discharge that are different than those Respondent asserted at trial and indicate that the decision to discharge was made after March 2. Indeed, in a statement given to the Board during the investigation by Matthew Zaheri, Respondent's owner and the individual clearly calling the shots, **Zaheri specifically stated the decision to discharge Rocha was made on March 5!** The ALJ inexplicably failed to include this statement in his discussion of the facts or the analysis thereof.

General Counsel respectfully submits herein that the ALJ erred in concluding that Rocha was discharged not for his suspected union activities and support but for attendance problems. General Counsel further believes that the ALJ erred in dismissing allegations that Respondent refused to hire Mark Higgins because of his union affiliation and unlawfully solicited grievances, created the impression of surveillance, and made statements of futility about organizing to its employees, all in violation of Section 8(a)(1) of the Act.

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[4] The ALJ never makes specific credibility rulings. As discussed in detail below, his credibility determinations must be implied from his ultimate conclusions regarding the discharge of Rocha and the failure to hire Mark Higgins.

Finally, General Counsel submits that the ALJ erred in concluding that a *Gissel* bargaining order was not warranted herein. General Counsel respectfully submits that such remedy is warranted by the threats of job loss and plant closure, the ongoing coercive interrogations, and the grant of wage increases to mechanics found by the ALJ to restrain, coerce, and interfere with their Section 7 rights. This remedy is even more warranted considering that the unlawful discharge of a union supporter occurred almost immediately after Respondent first learned of the Union's presence, and that such knowledge was gained through coercive interrogations throughout this small workplace. The derivative Section 8(a)(5) violations of unilateral action and failure to furnish information are necessarily established if a bargaining order is issued herein.

II. THE DISCHARGE OF PATRICK ROCHA

A. Introduction

The ALJ correctly found that the General Counsel had made a prima facie showing that Respondent was motivated by Rocha's union activities in discharging him. The ALJ found: "Rocha attended the union lunch of March 2. Garcia learned that Rocha had been at the meeting. Garcia threatened to "blow out" Rocha. Rocha was discharged shortly thereafter." ALJD at 9, ll. 17-20. The ALJ then noted that the burden of persuasion shifted to Respondent that it would have taken the same action in the absence of protected activity. Despite Zaheri's statement to the Board during its investigation that he made the decision to discharge Rocha on March 5, the ALJ, **without discussing or even acknowledging Zaheri's prior inconsistent statement**, credited Zaheri's and Garcia's testimony that Zaheri made that decision on February 27. ALJD at 9, ll. 24-25.

Respondent's testimony relied upon by the ALJ to support his conclusion can be grouped as follows:

- Garcia counseled Rocha on February 12, 19 and 26 about his attendance problems.
- Rocha was late on February 27. Garcia contacted Zaheri and recommended discharge. Zaheri approved the discharge.
- Garcia intended to discharge Rocha on March 2 (the end of the pay period) but was delayed due to the unexpected arrival of a Chrysler factory representative. Garcia gave instructions to prepare Rocha's final check on Monday morning, March 5.
- Frontella spoke to Rocha in January 2007 about his late arrivals, his long lunches, and early departures. Frontella spoke to Garcia about Rocha's attendance the second week of February. He further also spoke to Rocha about diagnostic issues.
- Nickerson testified that Rocha cost the dealership time and money by clocking out early. ALJD at 9, ll. 23-42.

The General Counsel respectfully submits that the evidence does not support these findings, as will be shown below.

The ALJ's findings that Respondent would have discharged Rocha even absent his union activities is based solely on the testimony of Garcia, as supported by Frontella, Nickerson, and Zaheri. Not one bit of their testimony is supported by any document. The ALJ did not explain why he found their testimony credible. This is noteworthy, because he found their testimony under oath as not worthy of belief in the following instances: Frontella's denial that he told Rick Avelar, Jeff Wells and Paul Seefeld that they had to obtain union withdrawal cards before they could work(ALJD at 6, ll. 25-31); Garcia's denial that the threatened Lane with job loss and plant closure(ALJD at 6, ll. 31-43); Garcia's and Nickerson's denial that they spoke by telephone the afternoon of March 2 (ALJD at 6, ll. 43-44), testimony proven to be false by subpoenaed cell phone records; Garcia's statement to Lane that he would "blow them out" if he found Avelar and

Rocha were ringleaders (ALJD at 6, ll. 44-45); Garcia's denial that he repeatedly and coercively interrogated of Lane, Blanco, Seefeld, Baybayan, Wells, and Bumugat or even met with them (ALJD at 7, ll. 18-34); Garcia's denial that he agreed with Higgins that he was being blackballed because his cousin was the Union's business representative (ALJD at 8, ll. 16-20); Garcia's testimony that he told employees their pay would be reviewed after 90 days (ALJD at 8, ll. 36-44); Nickerson's denial that he asked Rocha if he were still a union member when he was hired (Tr. 315); and Nickerson's denial that he called Lane on the cell phone and asked if Lane knew who was behind the organizing effort (ALJD at 4, ll. 8-9). As stated above, the ALJ did not explain why he credited the unsupported testimony of Garcia, Nickerson, Zaheri, and Frontella that the decision to fire Rocha had already been made before March 2 when he discredited them on nearly everything else.

B. Credibility

There are literally thousands of ALJ decisions regarding alleged discriminatory discharges published in the volumes of Board decisions since its inception. These decisions have one thing in common – the ALJs explain, often at great lengths, the reasons for their findings and credibility determinations. It is not appropriate for an ALJ to list a few facts, ignore contrary facts, and then conclude that there was or was not a legitimate business explanation for the discharge. But that is precisely what happened herein. Over the years the Board, in its expertise, has identified factors relevant for evaluating the truth or falsity of the reasons asserted by an employer for an alleged discriminatory discharge. As stated above, some of these factors are timing, shifting reasons, inconsistencies, disparate treatment, and condonation. All of these factors are present in this case, but one would not know it from reading the ALJ's decision.

In this case, employees Wells and Bumagat gave sworn statements to the Board during its investigation and were called to testify. Wells was a principal union organizer. (Tr. 49) In

the two months prior to the hearing, he met twice with Zaheri in his office to discuss his anticipated testimony and twice with Respondent's counsel, with Zaheri present (Tr. 519, 523) He cancelled appointments to meet with Counsel for the General Counsel. (Tr. 517-19) At the hearing, he testified that many things in the statement he had given were "willfully false" and gave contradictory testimony with respect thereto. Similar events happened regarding Bumagat. (Tr. 671-72, 676-79) Both witnesses were called to corroborate the testimony of other technicians, which testimony was ultimately credited by the ALJ. When a witness recants prior testimony, whether it be oral testimony or a pretrial affidavit or statement, the administrative law judge may choose to credit the original or recanted testimony. See, e.g., *Alvin J. Burt & Co.,* 236 NLRB 242 (1978); *Southdown Care Center,* 313 NLRB 1114 (1994); *Lowe Paper Co.,* 302 NLRB 622 (1991); *Shin Nihon Kosan, Inc.,* 273 NLRB 755 (1984); *Snaider Syrup Corp.,* 220 NLRB 236, 244-45 (1975). In these cases, the administrative law judge credited the original testimony.

In this case, the ALJ found Wells and Bumagat not to be credible witnesses and discredited both their hearing testimony and pre-trial statements, at least with respect to specified Section 8(a)(1) statements. (ALJD at 4, ll. 4-6, 19-20) Although the ALJ found these 8(a)(1) statements to have occurred based upon the credited testimony of other witnesses, this, in effect, resulted in discrediting testimony that corroborated credited testimony. The ALJ's approach may not have been unreasonable, given that Wells and Bumagat were necessarily lying at some point. But Garcia and Nickerson were conclusively demonstrated to have testified falsely about the phone calls to each other on March 2 by the introduction of the cell phone records. Further, Nickerson was conclusively demonstrated to have testified falsely about Respondent's workload in February by the introduction of Respondent's production records. Zaheri's testimony that the

decision to terminate Rocha was made on February 27 was contradicted by the statement he gave to the Board that the decision to terminate was made on March 5. (GC Exh 38) The False Statements Act, 18 U.S.C. Section 1001, makes a willfully false, material statement given to Board Agents a felony whether sworn or not. The ALJ did not explain why he chose to credit Garcia, Nickerson, and Zaheri about the timing of the decision to discharge Rocha when, under similar circumstances, he discredited the testimony of Wells and Bumagat.

As argued above, the ALJ based his ultimate conclusion as to the discharge of Rocha on credibility determinations rather than an evaluation of the evidence submitted herein.[5] It is not clear, however, whether an evaluation of the witnesses' demeanor played any part. The ALJ employed a footnote regarding credibility resolutions (ALJD at 2, n.2), but this footnote is used verbatim in all the recent decisions of this judge. General Counsel respectfully submits that the boilerplate use of this footnote weakens its applicability. This footnote uses the term "demeanor" in general, but not in reference to any specific witness. There is no other use of this term in the ALJ's decision.

Such an approach has found recent disfavor in Board decisions, especially as the judge's findings relate to respondent's motivation, as is the case herein. Respondent's motivation is an ultimate fact rather than an evidentiary fact. In *IBEW, Local 429*, 347 NLRB No. 46 (2006), the Board overturned the judge's conclusion that the respondent's actions were not unlawfully motivated. The judge's conclusions were based largely on unexplained credibility determinations. The Board stated:

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[5] This applies as well to Respondent's failure to hire Higgins. See discussion *infra.*

The judge did not explain his basis for accepting the self-serving assertions of the Committee members on the ultimate issue, the Committee's motivation in attempting to have Page transferred to a different employer. Such self-serving declarations regarding motive are certainly not conclusive. See *Shattuck Denn Mining Corp. v. NLRB,* 362 NLRB 466, 470 (9th Cir. 1966). *Ibid.* (emphasis added). Respondent's bare assertion that it fired Rocha for attendance issues is nothing more than a self-serving declaration that it discharged Rocha for motives that were not unlawful.

In *J.N. Ceazan,* 246 NLRB 637, 638 n. 6 (1979), the Board stated:

The Board has consistently held that "where credibility resolutions are not based primarily upon demeanor ...the Board itself may proceed to an independent evaluation of credibility." See *International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 38 (Cleveland Electro Metals Co.),* 221 NLRB 1073, 1074 n.5 (1975); *Canteen Corporation,* 202 NLRB 767, 769 (1973).

The Board has further pointed out that:

> ...in any event the ultimate choice between conflicting testimony rests not only on the demeanor of the witnesses, but also on the weight of the evidence, established or omitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.

El Rancho Market, 235 NLRB 468, 470 (1978), citing *Northridge Knitting Mills, Inc.,* 223 NLRB 230 (1976) and *Warren L. Rose Castings, Inc. d/b/a V & W Castings,* 231 NLRB 912 (1977). In *El Rancho*, the Board noted that while the judge referred generally to the demeanor factor, it did not appear that specific credibility resolutions were based on his observations of the witnesses' testimonial demeanor. *Ibid.*

In this case the ALJ has ignored evidence of timing, shifting reasons, inconsistent statements, disparate treatment and condonation. The ALJ has ignored the compelling evidence contained in Respondent's own documents and position statement that Rocha was discharged for reasons different than those asserted at the hearing and that the decision was made after the Harry's Hofbrau luncheon. (See GC Exhs 15, 31, and 34.) The ALJ has ignored Zaheri's admission contained in a statement given to the Board that he made the decision to fire Rocha on Monday, March 5. (GC Exh 38) Given these omissions, the Board's opinion in *Jewel Bakery, Inc.*, 268 NLRB 1326, 1327 (1984), is especially instructive:

> The Board has not applied *Standard Dry Wall* policy so as to make inviolable an administrative law judge's credibility resolutions, including those based on demeanor. In cases in which the excepted-to credibility resolutions are in decisions which have omitted reference to relevant testimony and have mistakenly characterized the state of the record, the Board has accorded less weight to the factor of demeanor. Thus, the invocation of the demeanor factor is not a substitute for a complete review and analysis of all the record evidence.
>
> In this case, the judge's decision omitted reference to relevant testimony on critical matters, and no reasons were set forth for ignoring such testimony. Further, conclusions were based on testimony which was not placed within context. And, finally, the decision contained statements and findings unsupported by the record evidence.

The General Counsel respectfully urges the Board, for the reasons expressed above and based upon this longstanding authority, to review and consider all the evidence herein, make its findings and conclusions based upon its independent evaluation thereof, and reverse the credibility conclusions to which the General Counsel has excepted for the reasons described herein.

C. Garcia Did Not Counsel Rocha in February About Attendance Problems (Exception No. 36)

The ALJ credited Garcia's testimony that he counseled Rocha on February 12, 19, and 26 about attendance problems. (ALJD at 9, ll. 23-24) Rocha testified that he met with Garcia only once, in mid-February, and that this was at his instigation because he was not being assigned enough work to earn a decent paycheck. (Tr. 333-36) According to Garcia, he met with Rocha on February 12 to counsel him about coming to see him if Rocha took more than a half-hour to diagnose a problem, if he ran out of work, or if he felt that a job was undersold. (Tr. 966) According to Garcia, he entered a record of that meeting on an Excel spreadsheet on his computer. (Tr. 965; GC Exh. 16) This record also states that Rocha was not to leave early unless a manager approved it. The first sentence on the record states that Garcia and Rocha talked about his not working 40 hours a week and producing only 25-26 flat rate hours.

General Counsel submits that this document is a forgery, created by Respondent after the filing of the unfair labor practice herein. In the first place, Respondent cannot document that this minute was created on February 12.[6] (Tr. 1037-40) Second, despite the alleged instructions

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[6] In Microsoft Excel, one can determine when a document was first created, last modified and last visited. (Tr. 1038) Garcia determined that the document where the minute is placed was created on January 22, 2007, and was unrelated to Rocha. (Tr .1038) The document that was created at that time, the My Forecast document, was modified and visited after February 12. Consequently, because the minute is not a stand-alone

given by Nickerson to Garcia to "write Mr. Rocha up," (Tr. 1041), Garcia did not do so.[7] When asked why he had not done so and why he did not give a copy of the report to Rocha or have him initial it, Garcia could only respond "I don't know." (Tr. 1041-43) Had Garcia done so, there would be no issue about this counseling session, and Respondent's asserted reason for discharging Rocha would be more credible. The ALJ showed no hesitancy in discrediting Garcia many times; there should be no difference between untrustworthy testimony and untrustworthy testimony backed up by a unverified document created for the hearing.

General Counsel submits there is no documentation because the alleged counseling session never happened. There is no reference to it in the Separation Notice that Respondent gave Rocha upon his termination, despite Garcia' assertion that the main counseling session was held on February 12, where five issues and expectations were allegedly laid out for Rocha, and despite the instructions on the notice to fully explain the reasons for separation, including dates and descriptions of warnings, advance notice given, and efforts made to resolve problems. (GC Exh 15; Tr. 1053, 1059) When asked why he had not made reference to this alleged counseling session in the Separation Notice, all Garcia could say was "I don't know." (Tr. 1059) Garcia testified that he told Rocha on February 26 that this was his last warning. (Tr. 969) The alleged counseling session record contains an entry for February 26 – "February 26th still taking too long

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document, Respondent cannot document that it was created on February 12. General Counsel submits that a computer expert could examine the hard drive and determine exactly when this minute was created. Respondent elected not to do this.

7 Nickerson testified that his understanding of "write him up" means you give a copy to the employee and have him initial it. (Tr. 935)

to diagnose a job needs to come see Jim G" – but it says nothing about a last or final warning being given. Nor does the Separation Notice. The minute for February 26 does not even state that Garcia and Rocha met that day, only that Rocha needs to come and see Garcia. Despite Garcia's testimony that the discharge was precipitated by Rocha's late arrival on February 27, neither the alleged counseling session record (for either February 12, 19, or 26) nor the Separation Notice says anything about coming in late. When asked why the Separation Notice said nothing about coming in late, all Garcia could say was, once again, "I don't know." (Tr. 1056)

One of the few things Garcia and Rocha agreed upon in their testimony was their concern that Rocha was only producing 25-26 flat rate hours each week. (Tr. 333-36) Rocha complained that he was not being given enough work and, therefore, was receiving small paychecks. It is uncontraverted that the two discussed the lack of work being given Rocha.[8] Although Garcia was Rocha's supervisor (Tr. 963), Frontella was responsible for giving work to the technicians. Despite Garcia's admission that Rocha told him he was not getting enough work (Tr. 1045) and his testimony that he instructed Rocha to see him if he was not getting enough work, Garcia never instructed Frontella, on or after February 12, to make sure that Rocha had work to do. (Tr. 1045) Garcia did not explain why he did not take this obvious step.

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[8] The problem was that Rocha was not being given work. It was not that he was taking too long to do the work he was given. This was established by Respondent's own records. Based on records provided by Respondent in Respondent's Exhibit 12, Rocha's productivity index, measured by flat rate hours divided by clock hours (Tr. 1067-68), was third highest out of five technicians in January and third highest out of seven technicians in February. (GC Exh. 26; Tr. 1067-74)

D. Zaheri Did Not Approve the Discharge on February 27 (Exception No. 29)

Respondent's stated reasons for terminating Rocha have shifted over time. The Separation Notice handed Rocha on March 5 mentions "Patrick's ability to get the work done correctly and on time" and "left early without permission did not advise anybody that he left." (GC Exh. 15) It says nothing about attendance in general nor arriving late on February 27. The explanation given to the California Employment Development Department by Respondent states "the employee was counseled about poor performance and failed to improve his performance and he left early in defiance of employer's express directions that he not do so." (GC Exh. 31) Respondent's position statement dated May 22, 2007, refers to a counseling session of February 12, 2007, regarding not working 40 hours a week and producing only 25-26 flat rate hours, a discussion about the same matters on February 19 including going home early, taking too long to diagnose a job on February 26, and concluding that "no correction of the problems was evident on March 6, 2007, including an early unauthorized departure." (GC Exh 34, page 4) The "left early without permission," "left early in defiance of employer's express directions," and "early unauthorized departure" referred to in the Separation Notice, letter to EDD, and position statement, respectively, can only be referring to Rocha's early departure the afternoon of March 2. (All three documents say nothing about coming in late on February 27.) Such a finding, however, would gut Respondent's position at the hearing. Zaheri furnished a statement during the Board investigation stating that the dismissal "came about from a lack of hours worked, days missed with no call and low hours produced during the months of January and February." The statement details Rocha's attendance history and concludes that he left early on February 28, March 1, and March 2: **"On the following Monday, 3/5 he did not come in or call and the**

decision to terminate him was made."[9] (GC Exh. 38) Thus, the ALJ's findings are not supported by, and are inconsistent with, these aforesaid documents.

At the trial, Garcia, supported by Frontella, Nickerson, and Zaheri, testified that the precipitating event was Rocha's late arrival on February 27, resulting in the decision that day to terminate him. (Tr. 969-70) By testifying that the decision was made on February 27 because of Rocha's late arrival that day, Respondent has (1) contradicted its Separation Notice, EDD submission, position statement, and Zaheri statement, (2) made irrelevant Rocha's early departures on February 28 through March 5; and (3) damaged its credibility. General Counsel believes that Respondent did this because it wanted to avoid the implications from the timing of a decision made immediately after the Harry's Hofbrau luncheon and from Garcia's "smoking gun" statement that he would "blow [Rocha] out" if he found out he was the ringleader.

Respondent had no documentation to support its testimony that the decision to terminate Rocha was made on February 27. (Tr. 1051) Garcia testified that his intent was to terminate him at the end of the week on Friday, March 2, but did not get around to it because of the unanticipated visit on Friday of a Chrysler factory representative[10] and because of the "ruckus in the shop" after lunch. (Tr. 970-71) Garcia's testimony is contradicted by the following: (1) the

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9 General Counsel submits the Zaheri statement is dispositive on the issue of when the discharge decision was made. One would have hoped that the ALJ would have discussed it and, indeed, relied on it.

10 This unnamed factory representative did not testify, nor was any document introduced to establish tht such a visit did indeed occur. Experience and common sense instructs that the factory representative would have send Respondent a letter stating the results of the unannounced inspection, either pointing out encountered problems requiring correction or extending congratulations for a spotless dealership. General Counsel submits that an adverse inference should be drawn against Respondent because of its failure to offer testimony from this alleged witness, which testimony is crucial to support its alibi.

so-called ruckus was admitted by Garcia to last only 30 minutes (Tr.1060); (2) the Separation Notice and EDD submission refer to events occurring on March 1 and 2; and (3) Respondent's position statement and Zaheri's statement discussed above state the decision to terminate was made on March 5. Moreover, Garcia requested that Rocha's termination check be prepared at 8:06 a.m. on March 5. (Tr. 972-73, 1061; R. Exh. 25) When asked why he had not submitted such a request first thing the morning of Friday, March 2, to carry out his intent to terminate that day, Garcia could only respond: "Don't know. Procrastination, I got all day to let them know." (Tr. 1061) General Counsel submits that if Garcia intended to discharge Rocha on Friday, March 2, he would have made this request first thing in the morning, before he would have been distracted by the alleged arrival of the factory representative.

E. Frontella Never Counseled Rocha About Attendance

The ALJ found that Frontella counseled Rocha about his late arrivals, long lunches, and early departures. However, Rocha flatly denied this, testifying that the one meeting with Garcia in mid-February, at Rocha's request to complain about not getting enough work, was the only meeting he had with Respondent's managers about any work-related issue (with the exception of an early January meeting with Nickerson not relevant herein). (Tr. 333-36) Respondent furnished no document to support Frontella's testimony.

General Counsel submits that the evidence established that Respondent allowed its technicians to leave work early if they first notified a manager. (See discussion *infra.)* Because a technician received no pay or any benefit from sitting around at work with no work to do, mechanics would leave early. Rocha left early many times during his employment on occasions

when he had no work to do, and he would first notify Frontella.[11] (Tr. 318). Rocha would leave early because Respondent paid its mechanics a specified sum for doing an assigned work order, and he would receive no compensation for remaining on premises with no work to do. Rocha wanted more work and complained to Garcia in mid-February 2007 about not being assigned enough work. Garcia looked at Rocha's log of hours and responded that they would have to give him more hours, otherwise he was "going to starve." (Tr. 333-35) Rocha had been unemployed for nine months prior to being hired by Respondent, and this unemployment caused him financial hardship. (Tr. 308-09) Rocha needed the job, and, once hired, he needed assigned work so that he could support his family. By remaining on the clock with no work to do, Rocha not only would earn no compensation, but his productivity index would decline. Having been laid off from his previous job because of low productivity, Rocha wanted to avoid looking bad on paper due to no fault of his. (Tr. 475) Respondent never counseled nor disciplined him for not finishing assigned work in a timely manner. (Tr. 320)

F. Rocha Did Not Cost Respondent Time and Money by Clocking Out Early (Exception Nos. 22-24, 38, 40, 45-47, 49, 50)

The ALJ found, without explanation[12], that Nickerson credibly testified that Rocha cost the dealership time and money by clocking out early. General Counsel respectfully submits that

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11 This testimony was not disputed by Frontella, who admitted that there were occasions when technicians had no work to do and were permitted to clock out if they first notified him. (Tr. 865)

12 The only discussion of this issue by the ALJ is the following sentence: "Nickerson testified credibly that Rocha cost the dealership time and money by clocking out early." (ALJD at 9, ll. 41-42) The ALJ did not discuss the substance of Nickerson's testimony. This issue was extensively litigated and is discussed in the following six and one-half pages of this brief. General Counsel respectfully submits that the ALJ's unexplained conclusion is not supported by the evidence. General Counsel further contends that the

this finding is contrary to the great weight of evidence. This evidence consists of witness testimony, Respondent's production records, and the time records of other employees which indicate that, during the period in question, Respondent basically let mechanics come and go as they pleased as there was insufficient work to occupy them for forty hours per week.

1. Other Employees Were Permitted to Work Less than Forty Hours

Respondent's treatment of Jason Massay is illustrative. Garcia testified that the forty-hour rule did not apply to Massay, as he made certain concessions with him "like I do with other technicians, as well." (Tr. 1080) One of these concessions was that he could work only a three-day, 36-hour week. (Tr. 1116) Respondent's accommodation of Massay's long commute may be praiseworthy, but it undercuts its contention herein that it needed its mechanics to be on premises every day. Respondent testified that some days were busier than others, and it would be short-handed if a busy day occurred on one of Massay's offdays. Garcia was also flexible with Massay's arrival and departure times. (Tr. 1118) Garcia also allowed Adamson to take a longer lunch. (Tr. 1146) Neither Adamson nor Massay signed union authorization cards.

Respondent apparently was not too busy that other mechanics could not leave early. Lane left at 12 noon on February 28 to train and left at 3:45 p.m. on February 26. Blanco left at 2:12 p.m. on February 9, 3:30 p.m. on February 19, and 12:42 p.m. on February 23. Emmanuel Gonzales left four hours early on February 26 and, on a couple of occasions in late February, clocked out of his last job one or two hours prior to quitting time. Baybayan left five hours early

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ALJ's finding was not based upon demeanor analysis, permitting the Board to make its independent evaluation of the evidence. See discussion *infra.*

on February 26 for training, left the premises at 3:24 p.m. on February 9, and left at 1:24 p.m. on February 20. (GC Exh. 27; Tr. 1081-91) These examples establish that other mechanics did not stay until 4:30 p.m., suggesting that the workload was not so heavy as to require their presence on the job.

Garcia attempted to draw a distinction between the treatment of these mechanics and the treatment of Rocha by claiming that the other mechanics had permission to leave early but that Rocha did not. (Tr. 1080-83) General Counsel submits that the truth is that all mechanics who left early, including Rocha, obtained permission to leave early by notifying Frontella and hearing no objection. Various witnesses testified this was the practice. Frontella did not testify that he ever told Rocha "no, stick around, you cannot leave."

2. Rocha Only Left Early When He Had No Work

Since Respondent paid its mechanics on a flat-rate system, i.e., piecerate, it incurred no costs if a mechanic, who had no assigned work, took off early.[13] Rocha testified he would often clock out early and leave if he had no work. (Tr. 318) The evidence shows that Rocha clocked out early on January 22, 26, 29, and February 1, 2, 6, 8, 9, 12, 19, 21, and 23.[14] Garcia testified Rocha had permission to leave early on February 12. (Tr. 1043) Rocha testified he had approval

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13 The only reference to benefits offered by Respondent was a 401(k) plan. Payroll taxes are directly related to compensation paid. There is no evidence that Respondent paid any benefit or tax not directly related to compensation paid. While an absent mechanic would take up space in the garage, the evidence established that Respondent had an abundance of space, which is a fixed cost. Respondent put on no evidence that its employment of Rocha prevented it from employing another mechanic.

14 This lists those days when Rocha clocked out before 4:00 p.m. Garcia testified that Rocha's departure on February 26 at 4:06 p.m., 26 minutes before the nominal closing time, was not a factor in this discharge, despite his claim that he gave Rocha a final warning earlier that day. (Tr. 1057)

to leave early a few other times for family business (Tr. 318), and this testimony was undisputed. Rocha kept a contemporaneous ledger of the Repair Orders (RO's) he worked on beginning on February 6. (R Exh. 14 ; Tr. 501) This ledger indicates he had only four RO's on February 6, of which two were "done" and two were "PH" (parts hold). On February 8 and 9, he had three RO's on each day. On February 19, the ledger lists only one RO. Rocha clocked out at 9:18 that morning; presumably, this was a day of family business for which he had prior approval. He had five RO's on February 21 (on which day Rocha could not complete his work because he was lacking parts – a rack and pinion on national backorder and a transmission control module – see discussion *infra)* and six RO's on February 23. All of this evidence tends to support Rocha's testimony that he left early only on days when he had no work to do (or had prior approval for family business).

Steve Rother, who worked next to Rocha, testified that Rocha would always say something like "Well, I'm going home, I don't have any work" or "they don't have any work for me." (Tr. 601) Lane testified that there were times when there was no work and that employees could leave early as long as they informed a manager. (Tr. 124, 134) Seefeld testified there were "times when there's nothing to do" and that he went home early once after telling Frontella. He assumed this was permitted since the shop was flat-rate. (Tr. 292) Avelar testified similarly. (Tr. 378) So did Baybayan. (Tr. 634) Frontella admitted this. (Tr. 865)

3. Respondent's Workload was Light in February 2007

In spite of the above, Nickerson was called to the witness chair to testify that the workload was heavy during Rocha's employment. (Tr. 894) However, Respondent's records do not support his testimony. Just as Respondent vigorously resisted the introduction of the Sprint-Nextel telephone records, which established Nickerson gave false testimony when he denied the March 2 telephone conversations with Garcia, it vigorously resisted the introduction of its

production records. (Tr. 1014-17) These records established that Nickerson's testimony that January and February were busy months was no more credible than his testimony that he did not call Garcia back on March 2. Thus, the number of labor, i.e., flat-rate, hours worked by the mechanics each month were: January = 1751.49; February = 1926.72; March = 1931.32; April = 1978.60; May = 2351.98; June 2352,02; July = 2181.22; August = 2819.29; September = 2114.83. (GC Exh. 25; Tr.1018) Respondent may contend that the proper analysis is the number of labor hours per employed mechanic. The record does not contain such an analysis because Respondent successfully resisted General Counsel's subpoena of the dates of employment of its hires; Respondent should therefore be estopped from making this contention. However, such analysis would be fallacious in any event. If Respondent were short-handed in early March when it terminated Rocha, and since there were no overhead costs in employing a low-producing mechanic as demonstrated above, and since there were plenty of stalls in the shop, it makes no sense to terminate a mechanic because his production is relatively low, because a low-producing mechanic produces more labor hours than no mechanic at all. If Respondent were as busy as it claims, it could not have afforded to let Rocha go, unless, of course, there is some other benefit to be gained, such as sending the message to the remaining mechanics that unionization will not be tolerated.

4. Respondent's Evidence Does Not Support the Conclusion That Rocha Left Early When He had Work to Do.

As stated above, Rocha left early on 12 days after January 22, 2007. But Respondent contends that this affected work only on three of those days: January 23, February 6, and February 21. [Nickerson testified that the failure to complete RO 50799 on January 17 was due to a diagnostic problem, not an attendance issue. (Tr.916)] Respondent's failure to contend that any other work orders were delayed due to Rocha's attendance must mean that Respondent could

not find any other examples. As it turned out, the four examples to which Nickerson testified do not support Respondent's contentions. Nickerson testified and produced documents with respect to four work orders on three days (excluding RO 50799 on January 17) when he claimed Rocha left work early when he had work to do: RO 51029 on January 23, RO 51558 on February 6, and RO 52156 and RO 52129 on February 21. (See Respondent Exhibit No. 23.)

A great amount of testimony was offered with respect to these four work orders. With respect to RO 51029 on January 23, the record is confused, but Nickerson testified that the car could have been completed on January 26 if Rocha had not taken a 3-hour lunch. (Tr. 1362) Nickerson had to admit that he was mistaken when shown Respondent's exhibit indicating that Rocha took a 54-minute lunch that day. (Tr. 1364) Rocha testified that there was a parts issue with this car (Tr. 1310), but Nickerson insisted the parts were available. When asked how he knew, he testified that he had researched the issue. (Tr. 1366-67) In other words, we are left only with Nickerson's word, and that is the word of a witness who falsely testified that he had not called Garcia back on March 2, 2007. Not only is this incident rather remote in time, but it is premised on Nickerson's mistaken assumption that Rocha took a 3-hour lunch that day.

With respect to RO 51558 on February 6, Rocha testified truthfully that a battery needed to be ordered. (Tr. 1308) Rocha clocked out at 3:06 p.m. that day. (R. Exh. 12) Respondent introduced documents that a new battery was invoiced at the vendor's location at 3:30 p.m. that day (Tr. 1345) but could only assume it was picked up and transported to Respondents' facility later that afternoon. (Tr.1348) Rocha's ledger, written contemporaneously by Rocha before the advent of any unfair labor practice issue, indicates PH (parts hold) for RO 51558, thereby bolstering his credibility on this matter. Nickerson testified that it was Respondent's practice to

pick up the battery the same day it was ordered, but Nickerson has been shown not to be a credible witness.

This leaves only RO 52156 and RO 52129, both on February 21. Rocha testified that he had to order a transmission control module for RO 52156. (Tr. 1308-09) Nickerson testified that the part was ordered on February 21 and that it arrived on February 22. (Tr. 1352) However, Nickerson had no documents to establish that the part came in on February 22. (Tr. 1358) Inconsistently, Nickerson's written summary (R. Exh. 23, first page) states the part came in on February 23. [Moreover, Rocha clocked out at 4:30 pm on February 22. (R. Exh. 12)] An examination of the RO (R. Exh. 23) indicates that there were problems with the starter or ignition which were difficult to diagnose; Rocha ultimately found a "bad spot" on the starter and replaced.it. It is very likely that this car was a "lemon" and that Nickerson was misrepresenting the facts in order to stretch this work order into an example that would support Respondent's position.

With respect to RO 52129, Rocha testified that he had to order a rack and pinion, which was on national back order due to a manufacturer's design flaw. (Tr. 1310) Nickerson, when called to rebut Rocha's testimony, said nothing about RO 52129, conceding the point. However, when testifying about this matter the first time, Nickerson, without discussing the work that needed to be done, testified that the work should have been done by February 26. (Tr. 920; R. Exh. 23) Either Nickerson's testimony was willfully false with respect to this RO, or else he did not bother to thoroughly check out the issue.

Thus, only two of these incidents have any possible relevance to Respondent's claim that Rocha left early with work to do: (1) RO 51558 on February 6 where the work order could not completed because the battery was on "parts hold," and (2) RO 52156 on February 21 where the

documents strongly suggest that the delay in completing repairs on this vehicle were due to something other than Rocha's leaving late. Given that Rocha worked approximately 50 days during this ten-week period and probably worked on 300-400 work orders, these disputed incidents do not in any way dent Rocha's testimony that he remained at work if there was work for him to do.

5. Nickerson Was a Discredited Witness Whose Testimony was not Credible

In short, the ALJ's finding that Nickerson testified "credibly" on this issue is simply unbelievable. Nickerson was obviously making it up as he went along. He showed no hesitancy in testifying falsely when it would suit his purpose, as when he lied about having had telephone conversations with Garcia on March 2. (ALJD at 7, ll. 3-4; Tr. 934) Clearly, Respondent wanted to pretend that March 2 was like any other day; thus, Garcia and Nickerson had to lie about their investigation into the Harry's Hofbrau luncheon. Here, Respondent wanted to pretend that it was harmed by Rocha's absences, but the evidence is clearly otherwise.

G. Respondent's Asserted Reasons are Pretextual (Exception Nos. 20, 21, 25-27, 30-35, 37, 39, 41-44, 48, 51-55)

The above discussion demonstrates there is no credible evidence to support the ALJ's finding that Respondent made the decision to fire Rocha before it gained knowledge of union activity on March 2. The only basis for his finding is the naked testimony of Garcia, Nickerson, Frontella, and their boss, Zaheri, the malfeasors herein, all of whom are highly untrustworthy and discredited witnesses. Not only do the facts herein not support Respondent's assertion, but the assertion runs afoul of legal concepts long found to be indicative of pretext: shifting defenses, disparate treatment, and condonation. Respondent seized upon Rocha's attendance record, something that it had no concern about, and has sought to use it as pretext for its real, unlawful reason.

Zaheri, Nickerson, and Garcia have, between them, decades of experience in the retail auto industry and in running an auto repair shop. Despite this, Respondent is asking the Board to conclude that it would take steps leading to and culminating in the discharge of an employee without any corroborating documentation. General Counsel respectfully submits Respondent is asking too much. The Board has noted that a respondent's failure to produce corroborating documentary evidence supporting its claimed justification for a discharge casts doubt on its credibility:

> Furthermore, the Respondent has failed to produce any documentary evidence showing that Snow was ever notified of or disciplined for these alleged deficiencies. Indeed, the sole document provided by the Respondent to support its claims was prepared specifically by Qualls in anticipation of this litigation.

Poly-America, Inc., 328 NLRB 667, 668-69 (1999).

Not only does the Separation Notice (GC Exh 15) fail to support Respondent's position, it contradicts it. One would reasonably expect, if Garcia were telling the truth, that the Separation Notice would refer to the alleged February 12 counseling session - but it does not. One would reasonably expect, if Garcia were telling the truth, that Garcia's spreadsheet record (GC Exh. 16) would have included something about a final warning being given on February 26 – but it does not. One would reasonably expect, if Garcia were telling the truth, that Garcia's record would have said something about attendance being discussed on February 26 - but it does not. General Counsel submits that the most reasonable conclusion of the facts herein is that Respondent jumped on Rocha's early departure on March 2, 2007, as an excuse to fire him and that its real reason was the advent of union activity among its mechanics, of which it had just learned. What better moment to send a message to the other mechanics that trying to organize is hazardous to your financial health! The evidence shows that Respondent has not disciplined

employees for leaving early when they had no work and, further, that Rocha only left early under such conditions.

As discussed above, Respondent's asserted legitimate reasons for Rocha's discharge have shifted over time, as well as the date upon which it claims the discharge decision was made. One would expect the reasons stated in the Separation Notice to be the truest statement of the reasons for discharge, but the Separation Notice herein has little resemblance to the reasons asserted at trial. The statement given to the EDD (GC Exh 31) is consistent with the Separation Notice but not with Respondent's trial testimony. The same can be said about Respondent's position statements (GC Exh 34) submitted to the Board and the statement that Zaheri prepared and gave to the Board. (GC Exh 38)These reasons focused on Rocha's early departure on March 2 and his claimed no-show on March 5 [Respondent's own documents establish Rocha was at work on March 5 – see GC Exh 23 and 24]. But Respondent was concerned about the timing of the discharge right after the Harry's Hofbrau luncheon; therefore, it fabricated a new reason for the discharge – arriving late on February 27 – to avoid the issue of timing.

It is black letter law that shifting reasons or justifications for a discharge "constitute relevant and even compelling evidence of unlawful motive" and "severely undermines [the employer's] credibility..." *NLRB v. Dorothy Shamrock Coal Co.,* 833 F.2d 1263, 126 LRRM 3313, 3317 (7th Cir. 1987), citing *NLRB v. Rich's Precision Foundry, Inc.,* 667 F.2d 613, 626 (7th Cir. 1981). See also *Enjo Architectural Millwork,* 340 NLRB 1340 (2003); *Southern Pride Catfish Co.,* 331 NLRB 618, 620-21 (2000); *Poly-America, Inc.,* 328 NLRB 667, 668-69 (1999); *Sound One Corp.,* 317 NLRB 854, 858 (1995). This is also true for inconsistent reasons articulated in the Respondent's position statement before the Board. *Black Entertainment Television, Inc.,* 324 NLRB 1161, 1161 (1997).

Respondent's treatment of Jason Massay, Ron Adamson, and other employees discussed above is relevant to show that Respondent did not require employees to be on premises forty hours a week. Respondent had an interest in seeing that its customers' vehicles were serviced properly and promptly. It had no interest in requiring mechanics to sit around the shop when they had no work to do. General Counsel submits that the weight of the evidence supports the factual conclusion that Rocha engaged in no misconduct in Respondent's eyes when he took extended lunches (like Adamson) or went home early. Respondent claims otherwise. To the extent that Rocha is considered to have engaged in misconduct, Respondent's more lenient treatment of Massay, Adamson, and other employees by not requiring them to be at work a full forty hours constitutes unlawful inconsistent or disparate treatment of Rocha, whom it suspected of being one of the two union ringleaders.

Finally, if one were to suspend disbelief and take Respondent at its word, it is clear that Respondent had condoned Rocha's early departures and long lunches, only to respond with discharge upon the intervening event of the Harry's Hofbrau luncheon on March 2. Garcia claims he counseled and warned Rocha about attendance on February 12. Yet, he took no action when Rocha took lunch breaks of 3, 1.3, and 2.5 hours on February 13, 15, and 16, respectively. Nor did Garcia take any action when Rocha took long lunches the week of February 19 and left at 9:18 a.m., 2:30 p.m., and 3:06 p.m. on Februrary 19, 21, and 23, respectively. Garcia states he gave Rocha a final warning on February 26 but took no action when Rocha took a 3.1 hour lunch that day. According to Respondent's records, Rocha worked only 22.45 hours the week of January 29 and 32.8 hours the week of February 5. (R. Exh. 12) The ALJ, by including every instance when Rocha left at any time before 4:30 p.m., found that Rocha left early 29 out of 30 days between January 22 to March 2. (ALJD at 5, ll. 44-45) What employer would tolerate such

early departures if it were something that mattered to the employer? The Board (and the ALJ, for that matter) are sufficiently experienced in labor-management relations to know that no employer would.

In *Webco Industries,* 334 NLRB 608, 609 n. 5 (2001), the Board described the typical condonation case "in which an employer tolerates an employee's misconduct until union activity begins, and then discharges him, assertedly because of the previously tolerated misconduct. In such cases, the only intervening event is the union activity." In such cases, the Board finds that the intervening event is the true reason for the discharge. In this case, Respondent tolerated Rocha's long lunches and early departures. It was only after Respondent learned of the union organizing effort that his attendance became an issue. His final check was prepared the morning of the next working day after Respondent gained such knowledge. General Counsel submits that this case fits the pattern of a typical condonation case.

Having found that the General Counsel established a prima facie case of discrimination herein, the ALJ noted that the burden of persuasion shifted to Respondent.
The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must "persuade" that the action would have taken place absent the protected conduct "by a preponderance of the evidence." *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion, a violation of the Act may be found. *Id.*, citing *Bronco Wine Co.*, 256 NLRB 53 (1981).

If the employer advances reasons for its actions which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp., 255* NLRB 722 (1981),

enf'd 705 F.2d 799 (6th Cir. 1982). In the leading case of *NLRB v. Shattuck Denn Mining Corp.*, supra, the Ninth Circuit explained the reasoning behind this rule of analysis:

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact-here the trial examiner-required to be any more naif than is a judge. (Footnote omitted.) If the finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal- an unlawful motive- at least where, as in this case, the surrounding facts tend to reinforce that inference. Here was a new union, just certified, and quite busy in advancing grievances; here was an officer of that union who was also a shop steward and an active member of the grievance committee; here was such an employee presenting a grievance, on his own behalf, against his supervisor. The inference that his discharge was motivated by a desire to discourage such union activity is by no means without basis. It seems to us a reasonable one to draw.

General Counsel respectfully submits that this rule of analysis and its underlying rationale apply with full force to Respondent's shifting justifications. This point was explained by the Supreme Court in a ruling under the federal employment discrimination laws:

> ...In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover-up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."...Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).

The ALJ found that Garcia, on March 2 right after learning about the Union, threatened to "blow out" Rocha if he was behind the union organizing drive. (ALJD at 7, ll. 3-9) The judge noted that this type of threat "is the ultimate threat an employer can convey to an employee." But the judge did not delve into the inconsistency between this finding and his finding that the decision to discharge Rocha had already been made. Why would Garcia use the conditional

tense ("I'll fire Rocha if he is behind this") if the discharge had already been made? Garcia's statement says nothing about Rocha already being on his way out and even implies that he is not. Why would he not say something like: "I'd fire Rocha if he is behind this except he's already being fired" or "I hope Rocha's the ringleader, because he's on his way out." General Counsel submits the reason is obvious – the decision to fire Rocha had **not** already been made. On the basis of the facts herein and the applicable law, General Counsel respectfully submits that the Board should conclude that Respondent discharged Rocha because of his union activities in violation of Section 8(a)(3) of the Act.

III. THE ALJ ERRED IN FAILING TO FIND THAT RESPONDENT DID NOT HIRE MARK HIGGINS BECAUSE OF HIS UNION AFFILIATION (Exception Nos. 59-61)

The ALJ found that General Counsel has established a prima facie case that Mark Higgins was not hired because of his union affiliation: "Respondent was hiring at the time and Garcia wanted to hire Higgins. Higgins was a skilled mechanic. Garcia answered affirmatively when Higgins accused of blackballing him because of his relationship to Breckenridge the union agent. The burden shifts to Respondent to show it would not have hired Higgins even in the absence of his union activity or affiliation." (ALJD at 10, ll. 31-36)[15]

The ALJ concluded that Respondent had met its burden based upon Garcia's testimony that Zaheri had rejected Higgins' application because he had turned him down previously in November 2007 and did not believe that Higgins could change. (ALJD at 10, ll. 38-43) There was testimony that Higgins, although an excellent mechanic, had a temper and was not a team player. General Counsel submits the problem with the ALJ's conclusion is twofold. As was the

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[15] See FES (A Division of Thermo Power), 331 NLRB 9, 12 (2000).

case with Rocha's discharge, it is based solely upon the credited testimony of Garcia and Zaheri, and the ALJ did not explain why he credited their testimony when he discredited them on almost everything else. More significantly, the ALJ, crediting Higgins, found that Garcia and Higgins had the following conversation when Higgins came to the dealership to inquire about his application:

> Garcia: "Well, I was going to hire you, but we cannot hire you at this time." Higgins asked if he was blackballed because his cousin was Richard Breckenridge (the Union's business representative) and Garcia replied "Pretty much, so." (ALJD at 8, ll. 16-18)

Garcia is **literally** telling Higgins the reason why he was not hired. This is a smoking-gun admission of an unlawful motivation.[16] At the hearing, Garcia did not seek to explain that he did not mean what he said to Higgins; instead, he denied it outright. The ALJ was correct in crediting Higgins and discrediting Garcia and found a Section 8(a)(1) violation.

Ordinarily, when an employer admits that it has refused to hire an individual because of his union affiliation, a violation of Section 8(a)(3) of the Act is found. Since Garcia did not attempt to provide any non-culpable meaning to his credited admission to Higgins that he was not hired because he was blackballed due to his union affiliation, it is not appropriate for the ALJ or the Board to speculate on his behalf. Accordingly, the plain English meaning of the credited admission must be utilized in drawing legal conclusions herein.

In this case the burden shifted to Respondent to demonstrate by a preponderance of the evidence that it would not have hired Higgins even in the absence of his union affiliation.

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[16] Higgins' testimony was corroborated by Wells. Thus, Garcia told Wells that he was going to hire Higgins but now that "this happened," i.e., the Union organizing, hiring him was "out the window." Wells asked why, and Garcia responded it was because of the union organizing and Higgins' relationship to Breckenridge. (GC Exh 18)

Evidence was offered that Higgins had, in the past, demonstrated a bad temper, and Zaheri testified that this was the reason he did not hire him in November 2007 when he opened the dealership. The Board's analysis in *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1081 (1980), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983), is instructive. Because of this evidence of bad temper, Respondent's affirmative defense has at least some merit, making this a "dual motive" case. Id. at 1084, n. 5. The issue herein is whether Respondent has demonstrated by a preponderance of the evidence that it failed to hire Higgins because of his bad temper rather than his union affiliation.

The evidence in support of the bad temper reason is the testimony of Zaheri and his subordinate Garcia. Garcia, of course, has been discredited many times by the ALJ and has been conclusively shown, by the introduction of cell phone records, that he gave false testimony under oath in this proceeding. General Counsel submits, therefore, that his testimony is worthless. Zaheri was, undoubtedly, the mastermind of all the unfair labor practices herein and committed some on his own. His credibility is damaged by the weight of the credible evidence regarding the alleged unlawful statements which he denied. Most importantly, on the critical issue of when the decision to terminate Rocha was made, Zaheri originally furnished a statement to the Board indicating the decision was made on Monday, March 5, contrary to his testimony at the hearing and Respondent's theory of the case. (GC Exh. 38) General Counsel submits his testimony is not worth much either.

Evidence supporting the conclusion that the failure to hire Higgins was due to his union affiliation reason includes the universal opinion that Higgins was one of the best auto mechanics in the Bay Area. Garcia admitted he wanted to hire him because of these qualifications. (Tr. 1010) Respondent was hiring and was in need of good mechanics. (Tr. 1010) However, the

major evidence in support of the union affiliation reason was Garcia's admission to Higgins that his union affiliation was the reason for his nonhire. Admissions of a party-opponent are generally held to be entitled to great weight.[17] When it refused to hire Higgins, Respondent was faced with a union organizing drive, was taking steps to dissuade its employees from supporting the Union, and could reasonably have expected Higgins to be a strong and influential voice in support of the Union as well as another "yes" vote.

General Counsel respectfully submits that when the testimony of Zaheri and Garcia is compared against the more trustworthy admission of Garcia, which the ALJ credited, Respondent has failed to demonstrate by a preponderance of evidence that it would have refused hire to Higgins in March 2007 notwithstanding his union affiliation. Accordingly, under the *Wright Line-FES* analysis, a violation of Section 8(a)(3) has been made out.

Indeed, it is not entirely clear that this analysis needs to be made, given this direct evidence of discrimination. In *Wright Line,* the Board stated that its burden-shifting approach was caused by the rarity of employer admissions that it acted with an antiunion motivation:

> In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action.

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17 See, e.g., Eyre, L.C.J., in Thomas Hardy's Trial, 24 How. St. Tr. 1093 (1794) ("the presumption upon which declarations are evidence [against a defendant] is that no man would declare anything against himself unless it were true"), quoted at 4 Wigmore, Evidence, Sec. 1048 n. 4 (1972).

Id. at 1083-84.[18] See also *Electronic Data Systems Corp. v. NLRB,* 985 F.2d 801, 805 (5th Cir. 1993) ("since an employer rarely admits that it discharged an employee for engaging in protected concerted activities, the NLRB may rely on circumstantial evidence in determining an employer's actual motive"). This is one of those rare cases where the employer has admitted its discriminatory motivation. Such admission should, at the minimum, preclude a finding based solely on self-serving testimony as to motivation.

IV. THE ALJ ERRED IN FAILING TO FIND THAT RESPONDENT GAVE THE IMPRESSION OF SURVEILLANCE, SOLICITED GRIEVANCES, AND MADE STATEMENTS OF FUTILITY

A. Impression of Surveillance (Exception No. 5)

The test for determining this violation of Section 8(a)(1) is whether the employee would reasonably assume from the supervisor's statement that his or her union activities had been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992). Service Director Garcia gave the impression that the employees' union activities were under surveillance through his directed questioning of Blanco, Bumagat, and Baybayan in primarily one-on-one meetings, stating to employees that he knew of the Union lunch, telling employees that Richard Breckenridge was a Union organizer, and suggesting that he knew that Union authorization cards were handed out and that employees signed them. (Tr. 630-31, 666, 690-91, 695; GC Exh 20) In *United Charter Service*, the Board found that where employees' organizational activities were held at a restaurant near the employer's facility, the manager's statements that he knew of their organizing efforts and his detailed comments about the extent of their activities and the specific topics discussed at meetings were unlawful since they suggested to employees that the employer

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[18] The Board based its burden-shifting approach on the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977).

was closely monitoring the degree and extent of their organizing efforts and activities. *Id.* Garcia did not simply lay forth general knowledge of activity but specifically identified where the employees had lunch, mentioned that employees signed Union authorization cards, and identified Breckenridge by name. Thus, in the context of Garcia's statements, the employees would reasonably believe that their meeting was monitored by management.

Zaheri's demand to know about the Union meeting and who paid for the pizza, immediately following a Union meeting held at a Round Table restaurant, also gives employees the impression that their Union activities were being monitored. (Tr. 1289, 1293-95) Although the questions were targeted at the larger group, the precision of identifying the type of food the Union offered the employees at the most recent meeting certainly conveyed a sense of surveillance.

B. Solicitation of Grievances (Exception Nos. 9, 12-14)

The Board has long held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See, e.g., *Center Construction Co., Inc.*, 345 NLRB 729 (2005), enfd. in part, den. in part by *Center Const. Co., Inc. v. N.L.R.B*, 482 F.3d 425 (6th Cir. 2007); *Uarco, Inc.*, 216 NLRB 1, 2 (1974). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. *Center Construction Co.* at 2. This inference is particularly compelling when, during a union organizational campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice. *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004).

At Respondent's Owner Matthew Zaheri's May 11 meeting, his invitation to employees, following his statement of "don't let outsiders influence you," to come to his office or to call him to discuss anything, was a solicitation of grievances. (Tr. 386, 700) The timing of his offer

during his staff meetings, which he did not conduct prior to the Union organizing drive, coupled with the threat of not letting outsiders influence them, was meant to relay to employees that he would solve their problems and the Union was unnecessary. There is no evidence that Zaheri, or any other manager, engaged in soliciting employee grievances before the Union's organizing drive. Consequently, Zaheri's actions constituted unlawful solicitation of grievances. No evidence supports the ALJ's finding that Zaheri had an open door policy.

C. Statements of Futility (Exception Nos. 15, 17)

An employer violates Section 8(a)(1) by threatening employees that any attempt to bring in a union would be futile. *Winkel Bus Co.*, 347 NLRB 1203, 1205 (2006), citing *Well-Stream Corp.*, 313 NLRB 698, 706 (1994). An employer's prediction as to the effects he believes unionization will have on his company is permissible if the prediction is based in economic necessities; otherwise, it is a threat of retaliation based on misrepresentation and coercion. *Gissel Packing Co. v. Food Store Employees Union,* 395 U.S. at 618. Zaheri's statement on May 11 that "outsiders aren't going to fix your problems" (Tr. 1230-31) and Garcia's remark that the Union could not help Respondent's technicians because it could not help the employees at the Porsche dealership across the street are unlawful threats that unionization is futile. (GC Exh 18) Without an objective basis, these statements of futility violate Section 8(a)(1).

V. ALTHOUGH THE ALJ FOUND THAT RESPONDENT UNLAWFULLY THREATENED AND INTERROGATED ITS EMPLOYEES, HE DID NOT LIST THE EXTENT OF SUCH THREATS AND INTERROGATIONS (Exception Nos. 3, 4, 6-8, 10, 11, 16, 18, 28)

The ALJ found that Respondent unlawfully interrogated employees, solicited and required employees to withdraw their union membership, told an applicant it would not hire a person affiliated with the Union, threatened plant closure and job loss, and granted wage increases to dissuade them from supporting the Union. (ALJD at 12, ll. 9-21) However, he did

not find all the threats and interrogations established by the evidence. (He did not find that they did not happen – he just neglected to discuss them in his findings.) General Counsel respectfully submits that the evidence warrants the following:

- Nickerson coercively interrogated Rocha by asking him if he were still a union member (Tr. 315);
- Zaheri threatened employees with plant closure at a group meeting by stating it would cost him $100,000 to defend against the charges brought by the Union and this could hurt, affect, or cause him to lose dealership (Tr. 223, 272-73, 1283-86);
- Nickerson coercively interrogated Lane by calling him on March 5 on his cell phone and asking him who was behind the Union organizing drive (ALJD at 4, ll. 8-9);
- Zaheri coercively interrogated employees at a group meeting on May 11 about a recent Union meeting (Tr. 1289, 1293-95);
- Garcia threatened Bumagat, Baybayan, and Wells with a loss of wages by repeatedly telling them that the Union would cause a pay cut (Tr. 630; GC Exh 20)(*Food King Market,* 224 NLRB 1158, 1164 (1976));
- Garcia's implied threats of unspecified reprisal to Avelar in May, by telling him that Wells and Seefeld were quitting the Union and that they were no longer going to attend Union meetings (Tr. 387-89), suggests that management was monitoring employees' union activity by counting support for or against the Union and implying that the Union would not win and remaining Union supporters should also abandon their support. A supervisor's statement to an employee that demonstrates his knowledge of union activity and ability to secure further

information is calculated and coercive and unlawfully interferes with Section 7 rights. *Genesee Family Restaurant & Coney Island,* 322 NLRB 219, 224 (1996);

- Zaheri threatened employees at a group meeting in May with implied termination when he told them "I own you" and that they were replaceable (Tr. 152-53, 383, 443, 597, 632-33, 701);
- Garcia threatened employees by repeatedly telling them that Respondent would not build a new facility if the shop went Union. (GC Exh 20) *Kroger Co.,* 311 NLRB 1187 (1983);
- Frontella coercively interrogated Wells prior to the commencement of his employment by asking him if he had a union withdrawal card. (ALJD 6, l. 22-28; GC Exh 20)

VI. A GISSEL BARGAINING ORDER IS AN APPROPRIATE REMEDY BASED UPON ALJ'S FINDING OF FACTS EVEN WITHOUT ANY JOB LOSS RESULTING FROM RESPONDENT'S UNFAIR LABOR PRACTICES (Exception Nos. 1, 2, 19, 56)

Under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), the Board, as the ALJ noted, may issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by "outrageous" and "pervasive" unfair labor practices. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede election processes." *Gissel* at 614. In such cases the rational for granting a bargaining order is that the "possibility of erasing the effects of past practices and ensuring a fair election... by use of traditional remedies, though present, is slight and ...employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." Id. In making this decision, the Board examines the seriousness of the violations and the

pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Intermet Stevensville,* 350 NLRB No. 94 (2007), citing *Abramson, LLC,* 345 NLRB 171, 176 (2005). The General Counsel submits that this case falls squarely within the second category.[19]

The ALJ based his decision not to grant a *Gissel* bargaining order on the grounds that "no employee lost employment as a result of Respondent's unfair labor practices," citing *Hialeah Hospital,* 343 NLRB 391 (2004). (ALJD at 11, ll. 23-24) Although exception is taken to this factual finding, General Counsel urges that significant evidence exists to warrant a bargaining order even without any such loss of employment. The record of the case shows that Respondent was guilty of several hallmark violations as well as several non hallmark violations, which were both numerous and serious, which serve to make a fair election nearly impossible.

In *Evergreen America Corp.*, 348 NLRB 178 (2006), enf'd 2008 U.S. App. LEXIS (4th Cir. June 26, 2008), the Board found that three hallmark violations accompanied by several non-hallmark violations, even without any loss of employment, were sufficient to warrant the issuance of a bargaining order. The Board came to this conclusion based upon the fact that the hallmark violations found (beneficial wage increases, promotions, and threats of plant closure and job loss), combined with numerous and serious non-hallmark violations (unlawful

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19 A prerequisite for a *Gissel* bargaining order is a demonstration through competent evidence that the Union was supported by a majority of bargaining unit employees. Although the ALJ neglected to expressly so find, it is implied in his decision. In any event, the ALJ correctly found that nine mechanics signed authorization cards (ALJD at 3, ll. 1-2); and the evidence established that the bargaining unit consisted of thirteen technicians (Tr. 18-19). If the service advisors are part of the appropriate unit, then ten out of sixteen unit employees signed authorization cards (Tr. 18-19; GC Exh 13).

interrogations, solicitation of grievances, and creating impression of surveillance) made it unlikely that a fair rerun election could be possible based on the lasting effects of the violation. The Board pointed out that the violations affected the entire bargaining unit, emanated from upper management, and persisted during the postelection period. In *Gerig's Dump Trucking*, 320 NLRB 1017, 1018 (1996), the employer's president and co-owner made threats of business closure and job loss as well as promises of increased benefits for the unit employees after they renounced the union. The Board found that the seriousness of the Respondent's unfair labor practices warranted the issuance of a bargaining order. In *Color Tech*, 286 NLRB 476 (1987), the Board issued a bargaining order where the employer solicited grievances, impliedly promised benefits, granted wage increases, and promoted and supported an anti-union letter circulated by anti-union employees. The Board noted that the centerpiece for the bargaining order was the grant of wage increases. *Id.* at 477. In *Red Barn*, 224 NLRB 1586 (1976), the Board issued a bargaining order because the employer conducted detailed and coercive interrogations and granted new group health and life benefits.

The instant case has several similarities with *Evergreen America Corp* and the other cases cited above. Two hallmark violations – threats of plant closure and job loss and the grant of wage increases – are present herein. The ALJ found that Respondent had unlawfully threatened plant closure and job loss. The Board has found such threats to be "among the most serious of unfair labor practices" which support the issuance of a bargaining order. See *MJ Metal Products*, 328 NLRB 1184 (1999). The ALJ found that Garcia, Service Director, made multiple threats of plant closure. Garcia threatened that the shop would never become union and that Zaheri, the owner, would shut the doors if such did occur. ALJD at 6. Additionally, Garcia threatened employees with termination many times; he threatened that people would get in

trouble, lose their jobs, and heads would roll if the shop became union. Garcia further threatened that he would "blow them out" if he found employees organizing. Id. at 6. And these are just the threats that the ALJ noted in his decision. As discussed above, the evidence also establishes the following threats were made (but not discussed by the ALJ in his decision): (1) Zaheri's threat that the monies paid to defend against the ULP charges would cost him $100,000 and could cause him to lose the dealership; (2) Zaheri's statement to employees that "I own you" and that they were replaceable; and (3) Garcia's threat that Respondent would not build a new facility if the shop went union.

The ALJ found that Respondent unlawfully granted wage increases to unit employees to dissuade them from supporting the Union. The Board considers such increases to be hallmark violations because of their "particularly long-lasting effect on employees" and "difficult[y] to remedy by traditional means." *Evergreen,* slip op. at 4. As stated in *Gerig*, such unlawfully-granted benefits serve as reminders to the employees that it is Respondent, not the Union, that is the source of such benefits, and that such benefits may continue as long as the employees do not support the Union. *Gerig*, supra at 1018.

In addition to these hallmark violations, the ALJ found that Respondent commited other violations which were both numerous and serious. These violations affected all or nearly all of the bargaining unit, especially those employees who had signed authorization cards, a factor which has been found to be particularly supportive of the issuance of a remedial bargaining order. See *Evergreen*, supra; *Cogburn Healthcare Center*, 335 NLRB 1397, 1399 (2001). The ALJ found that Respondent coercively interrogated Blanco (repeatedly), Lane, Seefeld (repeatedly), and Baybayan. The evidence also establishes that Garcia coercively interrogated

Wells and Bumugat.[20] In addition, the evidence establishes that Nickerson coercively interrogated Rocha and Lane and that Zaheri coercively interrogated the technicians at a group meeting.

The ALJ also found that Respondent, by General Manager Nickerson and Service Manager Frontella, told Avelar, Wells, and Seefeld that they had to obtain a union withdrawal card before they could work for Respondent. Soliciting and requiring to withdraw from the Union as a condition of employment not only violates Section 8(a)(1) of the Act, as the ALJ found, but the logical implication thereof is that one will lose one's employment if they reseek their union membership. After all, this is the literal meaning of a condition of employment. General Counsel respectfully submits that this unfair labor practice is a hallmark violation under *Gissel.*

As discussed above, the evidence established that Respondent also unlawfully created the impression of surveillance of the employees' union activities, solicited grievances to dissuade employees from supporting the Union, and made statements that attempts to secure union representation would be futile. These additional acts of interfering with employees' Section 7 rights warrant the issuance of a *Gissel* bargaining order.

In determining whether to issue a bargaining order, the Board also considers the size of the unit, the extent of dissemination of the unfair labor practices among employees, and the

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20 Baybayan and Bumagat both testified that Garcia called them together into his office on March 2 and demanded to know if they went to the Harry's Hofbrau luncheon and if they had signed union cards. (Tr. 630-631, 666, GC Exh. 20) Garcia denied this (along with everything else) but the ALJ discredited him. The ALJ credited Baybayan but stated he placed no reliance on Bumugat's corroborating affidavit given to the Board during its investigation. General Counsel respectfully submits that the credible evidence herein warrants that Garcia included Wells and Bumagat in his factfinding mission to find out what happened at Harry's Hofbrau.

identity and position of the individuals committing the unfair labor practices. All of these factors warrant the issuance of a bargaining unit herein. The unit is very small, thirteen in number, and some or all of the unfair labor practices affected all of the technicians. Dissemination, therefore, was to the entire unit. The malefactors herein were every manager and supervisor in the line of authority from Service Manager Frontella to Service Director Garcia to General Manager Nickerson to Owner and President Zaheri. The Board has found that the smaller the unit, the greater the impact of the unlawful conduct, especially where such unlawful conduct is pervasive throughout Respondent's entire management structure. *Big Horn Beverage*, 236 NLRB 736, 754 (1978).

In these circumstances, where Respondent has committed hallmark and other serious unfair labor practices, traditional Board remedies are unlikely to make possible a fair re-run election. Respondent engaged in a massive and blatantly unlawful response to employee organizational activities. Respondent's combination of pre-election threats of plant closure, employee terminations, and nearly across-the-board wage increases to a relatively small bargaining unit have a particularly coercive and lasting effect that will linger for an extended period of time. Such conditions make it highly unlikely that a fair and free election, untainted by coercion, can be held. This case warrants a remedial bargaining order.

VII. IN THE EVENT THE BOARD FINDS A BARGAINING ORDER IS NOT WARRANTED BASED ON THE ALJ'S FINDINGS, SUCH REMEDY WOULD BE APPROPRIATE WHEN THE UNLAWFUL DISCHARGE OF ROCHA IS CONSIDERED

The Board has consistently found a retaliatory discharge based upon union activity to be a hallmark violation warranting a remedial bargaining order. See, e.g., *Adam Wholesalers Inc.*, 322 NLRB 313, 314 (1996). As stated in *Adam Wholesalers*, such action demonstrates to employees that respondent is willing to carry out its threats and reinforces the employees' fear

that they would lose employment if they persisted in union activity. Id. at 314. General Counsel respectfully submits that the ALJ erred in his conclusion that Patrick Rocha would have been discharged even absent his union activities. When considered together with Respondent's other hallmark and pervasive violations herein, it is clear that traditional Board remedies are insufficient to correct the damage done to the employees' Section 7 rights. The possibility of erasing the effects of the Respondent's unfair labor practices is slight and holding a fair election unlikely; thus a bargaining order is the correct remedy.

VIII. CONCLUSION (Exception Nos. 57, 58)

For the reasons stated above, General Counsel respectfully urges the Board to find that Respondent committed additional violations of Section 8(a)(1) of the Act as contended herein and that it discharged Patrick Rocha and refused to hire Mark Higgins in violation of Section 8(a)(1) of the Act. General Counsel further urges the Board to issue a *Gissel* bargaining order as a measure necessary to remedy the unfair labor practices committed herein. Finally, General Counsel urges the Board to find the two derivative Section 8(a)(5) violations herein – unilateral action in eliminating the Lube Technician position and failure to furnish information, both of which are undisputed and admitted.

Dated at San Francisco, California, this 12th day of August, 2008.

/s/ David B. Reeves

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FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

and

MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS OF AMERICA, AFL-CIO

Case Nos. 20-CA-33367
20-CA-33562
20-CA-33602
20-CA-33655

DATE OF MAILING August 12, 2008

AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE and GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATION LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document*(s)* by facsimile, with their permission, upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me on	DESIGNATED AGENT
August 12, 2008	Susie Lowe **NATIONAL LABOR RELATIONS BOARD**